IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Civil Suit No. 40 of 2001

Judgment reserved on 20.11.2006

Date of decision : 19.12.2006

Ranbir Sipahiya and another **…Plaintiffs.**

Versus

State of H.P. and others **…Defendants.**

Coram

The Hon'ble Mr. Justice : Surjit Singh, Judge.

Whether approved for reporting?

For the plaintiffs: **Mr. Bhupender Gupta, Sr. Advocate, with Mr. Janesh Gupta, Advocate.**

For the defendants : **Mr. C.B. Singh, Deputy Advocate General.**

Surjit Singh, Judge

Plaintiffs, who are husband and wife, have filed this suit for recovery of Rupees twelve lacs against the State of Himachal Pradesh and its servants, impleaded as defendants No. 1 to 5, on the following cause of action.

2. Plaintiffs purchased a piece of land measuring six Biswas by the side of National Highway 22 at village Anjhi, Tehsil and District Solan, for construction of a house. They constructed a multi-storeyed structure

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Whether reporters of Local Papers may be allowed to see the Judgment?

covering an area measuring 8.69 X 16.02 meters. At the road level they constructed two shops and two storeys below the shops, they constructed residence having three bed rooms, kitchen, bath, toilet. Besides, they developed an open terrace and passage. The building was a reinforced cement, concrete structure. RCC retaining walls were also constructed for the protection of the building. The defendants did not maintain the National Highway near the site of the house of the plaintiffs properly. They provided wire-crates on the valley side for the protection of the Highway, but the same had not been properly placed in the sense that neither they had firm base nor any firm footing. Soling of the road near the house of the plaintiffs was also not properly done. Repair of the road was not carried out regularly. On the hill side no drain was provided for the flow of the rain water with the result that the rain water seeped into the road as also the site underneath the wire-crates. The plaintiffs had been requesting the functionaries of defendant No. 1 repeatedly for repairing the road and providing proper **Dangas** / retaining walls in place of unsteady wire-crates and also for constructing drain towards hill side for carrying the rain water, but no heed was paid to their requests. On the night of 17.7.2000 the road, above the house of the plaintiffs, slipped towards the valley side in the middle and the wire-crates and the debris of the road fell on the house of the plaintiffs, razing it to the ground. The plaintiffs had spent Rupees twelve lacs on the construction of the house. They had withdrawn money from their General Provident Fund Accounts besides spending their savings and raising loan from Life Insurance Corporation. According to them, it was on account of unplanned and haphazard placement of wire-crates, non-maintenance of the National Highway and the non-providing of drain towards the hill side by the functionaries of defendant No. 1, that the slipping of the road in the middle towards the house of the plaintiffs and thereby completely destroying their house took place. So they have

claimed damages on account of negligence on the part of the functionaries of defendant No. 1.

3. Defendants have contested the suit. They have raised a number of preliminary objections, besides questioning the facts stated in the plaint. It is alleged that the plaintiffs have not approached the Court with clean hands. The suit is alleged to be bad for want of proper notice, under Section 80 of the Code of Civil Procedure. The plaintiffs are alleged to be estopped by their acts and conduct from filing the suit. Plea of mis-joinder and non-joinder of necessary parties has also been raised. It is alleged that crate-wall had been in existence since 1989–90 and that it had been properly laid / placed. It is denied that the whole of the crate-wall had slipped. It is alleged that only an upper layer of the said wall had slipped. The cause of the slipping of that upper layer also is alleged to be not any act of negligence or rashness on the part of the functionaries of defendant No. 1, but the cutting of the hill slope by the plaintiffs while constructing their house and then not providing proper and adequate retaining structure for the protection of the cut portion of the hill side. It is alleged that the site that was purchased by the plaintiffs was slopy and they cut it into terraces, but did not provide proper and adequate walls for the protection / retention of those terraces and that was the reason for the sagging of the road and the crated-wall. The road is alleged to be very well maintained as it is very frequently used by VVIPs. for travelling between Shimla and Kalka - Chandigarh. It has been denied that there had been any seepage of water in the road or that the road was not properly maintained. It has also been denied that the soling of the road was damaged. It is alleged that the road was maintained properly and it was not only properly soled but even properly metalled and tarred. It has been denied that the functionaries of defendant No. 1 were ever approached by the plaintiffs for repairing the road or re-constructing the crated walls. It is alleged that as a matter of fact

the road and the crated-walls were in perfect condition and, therefore, there was no occasion for the plaintiffs to have approached the functionaries of defendant No. 1 with a request for re-constructing the walls or repairing the road. It has also been denied that no drainage was there on the hill side of the road for carrying the rain water.

4. In the replication the plaintiffs have denied the allegations made in the written statement and reiterated the version given in the plaint.

5. Following issues were framed on the pleadings of the parties:-

"1. Whether the plaintiffs have suffered damages due to negligence of the defendants, as alleged and, if so, to what extent they are entitled to amount of compensation? OPP

2. Whether the suit is not maintainable in the present form? OPP

3. Whether the plaintiffs are guilty of concealing material facts, if so, to what effect? OPD

4. Whether the suit is bad for mis-joinder and / or non-joinder of necessary parties and, if so, who are such parties? OPD

5. Whether the valid notice under Section 80, Code of Civil Procedure was served before the suit? OPP

6. Whether the plaintiffs are estopped from filing the suit on account of their acts, deeds and conduct, as alleged, if so, to what effect? OPD

7. Relief."

6. I have heard the learned counsel for the parties and gone through the record. My issue-wise findings are as follows.

Issue No. 1.

7. Admittedly the plaintiffs had constructed a multi-storeyed structure by the side of the National Highway. The distance between the acquired width of the National Highway and the structure of the plaintiffs was more than five meters. This fact is admitted by a witness of the

defendants, namely DW-3 Naresh Vasisht, who was the Assistant Engineer- in-charge of the road at the relevant time. The witness has further admitted that no permission of the National Highway Authority was required under the Road Side Control Act for constructing the building, because of the distance being more than five meters from the acquired width.

8. Another admitted fact is that the structure of the plaintiffs has been completely damaged rather razed to the ground on account of the fall of crated wall and the debris of a portion of the road that slipped on the fateful night, on it. The controversy is whether the slipping of a portion of the road and the fall of the crated wall of the road was triggered by the alleged digging done by the plaintiffs while raising the structure, as alleged by the defendants, or it was on account of defendants' negligence to repair the crated wall and the road and the failure to arrange for proper drainage of the rain water along the hill side of the road.

9. There is no evidence worth the name suggesting that any digging was done by the plaintiffs towards the road side while constructing their house. DW-2 N.K. Jindal, who was the Executive Engineer-in-charge of the National Highway, though stated that due to the cutting the soil by the plaintiffs, while constructing their house, the middle portion of the crated wall collapsed, yet in the cross-examination he admitted that he had never visited the site. If that is so, his statement that digging towards the hill side was done by the plaintiff in the process of construction of their house, cannot be believed. Otherwise also, plaintiffs' version that the structure raised by them stood on pillars and beams, has not been denied by the defendants. This type of structure does not require much digging. Only pits are dug to provide footing for the pillars and the same are then filled with rolled iron and concrete.

10. Another witness examined by the defendants is DW-3 Naresh Vasisht, who was working as Assistant Engineer-in-charge of the National Highway Dharampur at the relevant time, within whose area the damaged portion of the road fell. The witness did not say even a word about the plea taken in the written statement that the plaintiffs had carried out any digging towards the road while constructing their house and because of such digging the road and the crated wall sagged.

11. A new story was sought to be introduced by DW-2 Shri N.K. Jindal, who was the Executive Engineer at the relevant time and within whose area of operation the damaged portion of the road fell. He stated that the strata of the site on which the plaintiffs had erected the building, was loose and unable to bear the load of a five storeyed structure as was raised by the plaintiffs. No such plea having been raised in the written statement, his statement has simply to be ignored being at variance with the pleadings. More over, in the cross-examination the witness admits that he had never inspected the site of the house of the plaintiffs nor did he examine the strata or the soil. Furthermore, it is nobody's case that the building of the plaintiffs has sagged. On the contrary, undisputed fact is that the building has fallen due to the weight and thrust of the crated wall and the debris of the road.

12. From the above discussed position it is clear that the defendants' version that it was due to the digging carried out by the plaintiffs at the time of the construction of the house that the crated wall and a portion of the road sagged, is not believable.

13. Evidence led by the plaintiffs consists of the testimony of seven witnesses and certain documents. One of the plaintiffs, namely PW-12 Ranbir Sipahiya has stated that his building was four-and-a-half storeyed and that it consisted of pillars, beams and concrete slabs. He has stated that the site of his house is below the road level and that on the valley side

of the road above the site of his house, there existed 125 feet long crated wall, which was in bad shape. It is also stated by him that no drainage had been provided for the flow of rain water on the hill side of the road with the result that the water flowed towards his plot. It is also testified by him that in the middle, the road was badly damaged with the result that the water seeped into the damaged portion of the road and because of all these factors, on the night intervening 17th/18th July, 2000, when there was heavy rain, the crated wall collapsed and a portion of the road also slipped and the debris of the wall and the road fell on his building razing it to the ground. His testimony is corroborated by PW-11 Shyam Lal, whom he engaged as a mason for the construction of the building, PW-10 Dr. M.K. Shingari, who has his building at a distance of about 200 yards, PW-8 Rajpal Swami, a retired diploma-holder Engineer, who worked as Junior Engineer and Assistant Engineer in the Public Works Department of Himachal Pradesh and the reports, which were entered in the police record after the mishap, copies whereof have been proved by PW-4 Ram Rattan, H.C. and PW-5 Ashok Kumar.

14. PW-4 Ram Rattan has proved Ext. PW-4/A, Photostat copy of entry in the 'Rojnamcha', maintained at Police Post Saproon. A reading of this document shows that on 18.7.2000 plaintiff Ranbir Sipahiya informed the police telephonically that on account of heavy rain the retaining wall of the road had collapsed and its debris had fallen on his newly constructed house as an impact of which his house had been completely destroyed. The witness has also proved another entry in the 'Rojnamcha', copy Ext. PW-4/B, which is based on the information, which a Head Constable gave after visiting the spot. As per this entry, on account of excessive rain the retaining wall of the P.W.D. road and a portion of the road itself fell on the house of the plaintiffs as a result of which the house was completely damaged.

15. PW-8 Rajpal Swami has stated that the building of the plaintiffs consisted of RCC framed structure and that it was completely damaged because of the sagging of the retaining wall, which was in the form of crated wires, and the slipping of the road. He has stated that the retaining wall sagged because of the seepage of the water in the road, a portion of which was not tarred, and also because no provision for the drainage of rain water along the hill side of the road had been made. The witness has proved his report Ext. PW-8/B, plan Ext. PW-8/C and the abstract of the cost Ext. PW-8/D.

16. PW-10 Dr. M.K. Shingari has stated that his house is at a distance of about 200 yards from the site where the house of the plaintiffs stood. He stated that the construction of the house was started in July 1998 and that it was a framed RCC structure. He also stated that there were cracks in the National Highway above the house of the plaintiffs, which were over a portion of sixty feet (lengthwise) and the 'Danga', which was of loose stones, was also in damaged condition and because of this, when there was excessive rain on the fateful night, the 'Danga' and a portion of the road sank and the debris fell on the house of the plaintiffs as a result of which the house was completely damaged. To the same effect is the testimony of PW-11 Shyam Lal, who was engaged by the plaintiffs for the construction of the house. The additional fact testified by this witness is that before he laid the slabs he had told plaintiff Ranbir Sipahiya that the road above the site of the house being in bad shape and the 'Danga' also being tilted towards his house, it was not safe to lay the slabs and that the plaintiff told him that he would get the road and the 'Danga' repaired.

17. No doubt the above discussed evidence of the plaintiffs, when seen in the light of the fact that the defence version about the cause of the collapse of the 'Danga' and the slipping of a portion of the road, is not correct as held here-in-above, establishes that the plaintiffs were in no way

responsible for the sinking of a portion of the road and the crated wall, but that does not mean that the plaintiffs are in no way responsible for the damage sustained by them. It has come in their own evidence that the condition of the 'Danga' and the road had been the same as it was at the time of the sinking of a portion of the road and the 'Danga', when the plaintiffs undertook the construction of their building and even much before that. Reference in this behalf may be made to the testimony of PW-10 Dr. M.K. Shingari and PW-11 Shyam Lal, mason, who had been engaged for the construction of the house. Both these witnesses have stated that the condition of the road and the 'Danga' was the same since 1985. PW-11 Shyam Lal has gone to the extent of saying that crack on the road about one hundred feet in length had been there even when the construction was started in July 1998. Now, when the condition of the road was bad on account of its having a crack in the middle about one hundred feet in length, the crated wall ('Danga') was tilted towards the site on which the building was constructed by the plaintiffs and the flow of the water was also towards the valley side, on account of there being no provision for drainage of rain water along the hill side of the road, the plaintiffs as persons of ordinary prudence were expected to have not embarked upon the project of erecting a multistoreyed structure until the aforesaid defects in the road and the 'Danga' (crated wall) were removed and they were satisfied that there was no risk to the building planned to be constructed. As a matter of fact, PW-11 Shyam Lal, the mason, engaged by the plaintiffs, has stated that he had told plaintiff Ranbir Sipahiya that the condition of the road and the 'Danga' being bad, it was not safe to go ahead with the laying of the lintels over the pillars and the beams, but the latter told him to go ahead with the laying of the lintels as he (the plaintiff) would be approaching the National Highway authorities to repair the 'Danga' and the road.

18. As a result of the above discussion, it is held that even though the plaintiffs' building got destroyed because of the slipping of a portion of the road and the sinking of the 'Danga' on account of the defendants' failure to maintain the road and the 'Danga' just above the building of the plaintiffs, the plaintiffs are also to blame for the damage, as knowing full well that it was risky to construct the building until the 'Danga' and the road were satisfactorily repaired, they proceeded with the construction of the building.

19. Now coming to the quantum of damages, the plaintiffs have examined a retired Assistant Engineer from PWD, namely PW-8 Rajpal Swami. The witness has prepared estimate of the re-construction of the building. The same is Ext. PW-8/D. As per this abstract of estimate, a sum of Rs.10,89,600/- will be required for the re-construction of the building after removal of the debris etc. As a matter of fact, the cost has been worked out at Rs.8,96,220/-, but a sum of Rs.1,93,380/- has been added to this cost with the reasoning that the construction of the building will take three years to complete and during this period of three years the cost index would rise by about 25%. The evidence on record shows that the earlier structure was raised within a period of one year, because the construction started in July 1998 and regular electricity connection had been sanctioned in favour of the plaintiffs for electrification of the residential portion of the house in June 1999. Not only this, plaintiff Ranbir Sipahiya himself had been representing to the Executive Engineer of National Highway in the year 1999 for providing access to his building from the National Highway on the plea that he had completed the construction of his building. Reference in this behalf may be made to Ext. PW-12/G, written by plaintiff Ranbir Sipahiya to the Executive Engineer, National Highway. Therefore, the addition of an amount of Rs.1,93,380/- in the estimated cost of re-erection of the building in Ext. PW-8/D has to be ignored. Thus, the cost of re-erection, according to Ext. PW-8/D, after the exclusion of the aforesaid amount, comes to

Rs.8,96,220/-. No evidence in rebuttal has been led by the defendants. On the basis of the aforesaid statement of estimated cost of re-erection of the building, it is held that the plaintiffs have sustained damage to the extent of Rs.8,96,220/-.

20. Plaintiffs themselves also being negligent in the sense that they took the risk of constructing the building without first getting the road and the crated wall repaired, are not entitled to the entire amount of the loss sustained by them. The amount needs to be reduced at-least by fifty percent, on account of their having voluntarily run the risk. Thus the amount which they are entitled to recover from the defendants, comes to Rs.4,48,110/-. Issue is answered accordingly.

Issue No. 2

21. It was not pointed out during the course of hearing as to why the suit is not maintainable in the form in which it has been laid. So the issue is answered against the defendants.

Issue No. 3.

22. No evidence with respect to this issue has been led by the defendants to discharge the initial onus to prove. So the same is answered against them.

Issue No. 4.

23. It was not pointed out at the time of the hearing as to who are mis-joined parties and who are the necessary parties that have not been joined. So this issue is also answered in the negative.

Issue No. 5.

24. The plaintiffs have proved on record the copy of the notice, under Section 80 of the Code of Civil Procedure, that was sent to the defendants before filing the suit. Same is Ext. PW-12/H. Copies of the notice were sent by Registered Post. Postal receipts are Exts. PW-12/J, PW-12/K, PW-12/L and PW-12/M. No defect in the notice was pointed out

by the defendants during the course of the hearing. Hence, the issue is answered against the defendants.

Issue No. 6.

25. In view of the finding on issue No. 1 that the cause of the destruction of the building of the plaintiffs was not the alleged digging of the site at the time of the construction of the building, the issue is answered against the defendants.

Relief.

26. As a result of the above discussion and findings, suit of the plaintiffs is partly decreed and a decree for a sum of Rs.4,48,110/- is passed in their favour and against the defendants with proportionate costs and interest at the rate of 6% per annum, from the date of the filing of the suit to the date of the satisfaction of decree.

Decree sheet be drawn accordingly.

December 19, 2006 (BC)

(Surjit Singh)
Judge